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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 814

RICHARD D. IRWIN AND ANNE MARIE IRWIN,
Petitioners,

vs.

DEMPSEY-TEGELER & CO., INC., A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN H. BISHOP,
141 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Petitioners.

BISHOP, BURDETT, ERICSON & FLYNN,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Richard D. Irwin and Anne Marie Irwin, his wife, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit, which was rendered on August 5, 1969, is not yet reported, and such opinion is appended hereto, *infra,* pp. 1a-6a. In addition, the judgment of the Court of Appeals is appended hereto, *infra,* p. 7a.

The Opinion of the District Court in this matter is not reported, and such opinion is included in the Joint Appendix which is a part of the record certified to this Court.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on August 5, 1969, and the Petitions for Rehearing and Rehearing En Banc (which were filed on September 3, 1969) were denied on September 25, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Respondent Dempsey-Tegeler & Co., Inc. (hereinafter sometimes "Dempsey-Tegeler"), a securities dealer, brought an action against Petitioners Richard D. Irwin and Anne Marie Irwin (hereinafter sometimes "Irwin"), customers of Dempsey-Tegeler, for breach of contract and conversion of securities. The answer alleged wrongful conduct and various breaches of duty on the part of Dempsey-Tegeler. Trial by jury was seasonably demanded.

The District Court entered summary judgment against Petitioners holding, *inter alia*, that:

1. Irwin had, as a matter of law, ratified the wrongful conduct and breaches of duty of Dempsey-Tegeler, and

2. There was no genuine issue of material fact as to the requisite *knowledge* of Irwin in order to constitute a ratification.

The Court of Appeals affirmed these holdings of the District Court under Rule 56.

Thus, the questions presented for review are:

1. Was Irwin denied his constitutional right to a jury trial through the implement of summary judgment under Rule 56?

2. Was summary judgment properly entered below in view of the fact that one of the essential elements of

ratification is the *knowledge* and *intention* of the ratifier?

3. Was there a genuine issue of fact for a jury with respect to Irwin's *knowledge* of the wrongdoing and breaches of duty of Dempsey-Tegeler and his *intention* with respect thereto?.

4. Has the Court of Appeals decided a question of federal law under Rule 56 in a way that is in conflict with the decisions of this Court in *White Motor Co.* v. *United States,* 372 U. S. 753 (1962); and *Poller* v. *Columia Broadcasting System, Inc.,* 368 U. S. 464 (1962).

5. Has the Court of Appeals decided a question of federal law under Rule 56 which is in conflict with the decision of this Court in *United States* v. *Diebold, Inc.,* 369 U. S. 654 (1962), and the decisions of the Courts of Appeals for the Second, Sixth, Eighth, Ninth and Tenth Circuits.

CONSTITUTIONAL PROVISION AND RULE INVOLVED.

Constitutional provision involved:

The Seventh Amendment to the Constitution of the United States, which, in pertinent part, reads:

> "In Suits at common law . . . , the right of trial by jury shall be preserved. . . ."

Rule involved:

Rule 56 of the Federal Rules of Civil Procedure, which provides in pertinent part:

> "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE.

Nature of the Action, Proceedings and Disposition Below.

Dempsey-Tegeler & Co., Inc. brought an action against Richard D. Irwin and Anne Marie Irwin, his wife, alleging: (1) that the defendants converted 500 shares of the common stock of National Video Corporation which was the property of the plaintiff, and (2) that defendants breached an implied contract arising from the customs and usages of the securities markets and their relationship as customers and stockbrokers by failing to deliver to plaintiff 500 shares of such common stock. Defendants' answer denied liability for breach of contract or conversion, and affirmatively alleged: (1) that the liability asserted was unenforceable and void because the pertinent transaction was made and recorded by Dempsey-Tegeler in violation of the rules and regulations of the American Stock Exchange, (2) that Dempsey-Tegeler was under a duty to seasonably inform them of delivery and settlement requirements with respect to their securities transactions and that Dempsey-Tegeler failed to perform such duty, (3) that any damage suffered by Dempsey-Tegeler was due to its aforesaid breaches of duty, and (4) that Dempsey-Tegeler was estopped from asserting and had waived any right to additional deliveries of the common stock of National Video.

Defendants, Petitioners here, demanded a trial by jury.

Plaintiff Dempsey-Tegeler's motion for summary judgment was granted, and the court entered judgment in the amount of $55,417.96 plus interest from the date thereof.

The judgment of the District Court was affirmed.

STATEMENT OF FACTS.

Dempsey-Tegeler is a broker and dealer in securities and is a member of the New York Stock Exchange and the American Stock Exchange (4). Defendants, Richard D. Irwin and Anne Marie Irwin, are husband and wife and were regular customers of Dempsey-Tegeler or its predecessors from 1963 until April, 1966 (174, 176). Richard D. Irwin acted as the agent of Anne Marie Irwin in all transactions with Dempsey-Tegeler (9-10). Irwin's security transactions through and with Dempsey-Tegeler were substantial (177).

In his dealings with Dempsey-Tegeler, Irwin dealt solely with Robert F. Shields, a registered representative of Dempsey-Tegeler and manager of its branch office in Chicago Heights, Illinois (181-182, 56-57). Shields was responsible for the supervision of the receipt and delivery of securities in that office (50-51). The Chicago Heights office had no "cashier", and consequently bookkeeping functions, particularly with respect to the receipt and delivery of securities, were handled for that office by the "cashiering" department of Dempsey-Tegeler's Chicago office (62-63, 89-91). In 1965, Travers Bell, Jr. was in charge of the "cashiering" department of the Chicago office (62-63).

At the time Irwin commenced his relationship with Shields, he informed Shields that the demands of his business did not permit him to devote his attention to the particulars of his securities transactions or to the stock market in general (229). Shields informed Irwin that he would keep a complete record of Irwin's account so that Irwin would know at all times his position in the securities he had purchased (229, 223). Irwin told Shields that his account would require that type of attention (229, 223).

Subsequent to the inception of this relationship and until the controversy giving rise to this litigation, Irwin depended upon Shields for such information and attention (229, 223, 176). Irwin kept no record or account of his securities transactions or security positions (175). Dempsey-Tegeler, through Shields, attempted to keep such records (59-62, 64-5).

On September 1, 1965, Irwin owned of record 1500 shares of National Video Corporation (180-182). These shares were listed and traded on the American Stock Exchange (4, 10). On or about September 13, 1965, National Video Corporation, announced that it proposed a "two for one" stock split with respect to its outstanding common stock and that such proposal would be acted upon at an annual meeting of its shareholders to be held on October 13, 1965 (194-195).

On September 29, 1965, Irwin sold 500 shares of National Video through Dempsey-Tegeler (179).

On October 8, 1965, the American Stock Exchange, in a notice transmitted by ticker tape to its members, ruled and ordered with respect to transactions in National Video, *inter alia*, that:

> (a) In the event of stockholder approval of the proposed split and effective October 14, 1965, transactions in National Video might be settled either by delivery of the old certificates then outstanding or by certificates to be outstanding as a result of the split.
>
> (b) The common stock of National Video be quoted "ex" the distribution on November 1, 1965.
>
> (c) All stock delivered after October 12, 1965, in settlement of transactions made prior to November 1, 1965, must be accompanied by due bills and that such due bills must be redeemed on November 5, 1965 (16-17).

Dempsey-Tegeler had notice or knowledge of this ruling and order of the stock exchange shortly after it was made (117).

On October 18, 1965, at Shields' request, Irwin through his secretary delivered (against the sale of September 29, 1965) 500 shares of National Video Corporation stock to Dempsey-Tegeler (66-68, 29-32). On October 19, 1965, Dempsey-Tegeler issued its receipt to Irwin evidencing receipt of those 500 shares (29-32, 66-68). Shields and Dempsey-Tegeler did not request or require that Irwin also deliver due bills in connection with this delivery (29, 229-230, 84-85). Under the ruling of the stock exchange such a request should have been made (16-17, 110). Shields was not aware of the stock exchange ruling, and Bell did not inform Shields of it (84, 110). Although there was a practice and policy of Dempsey-Tegeler to notify customers of deficient deliveries with respect to stock being delivered after the record date of a dividend or stock split, Shields made no such notification and he was not aware of any notification being made by any other employee of Dempsey-Tegeler (85). Irwin was not aware that his delivery was in any way deficient (229, 230).

On October 22, 1965, Irwin sold an additional 500 shares of National Video (180). Sometime after October 28, 1965, Irwin received 1500 shares of National Video as a result of the split (197). On November 3, 1965, Irwin sold another 500 shares of National Video (180). On November 4, 1965, Irwin sold still another 500 shares of National Video (180).

On or about November 16, 1965, Shields informed Catherine Bogan, Irwin's secretary, that Irwin owed and was required to deliver to Dempsey-Tegeler 2000 shares of National Video (197-198, 29-30). In accordance with such advice by Shields, Irwin delivered 2000 shares of National Video to Dempsey-Tegeler (29-30). Irwin was informed

that that was all the shares of National Video owed to Dempsey-Tegeler (200-201). No due bills or additional shares of National Video were requested by Dempsey-Tegeler at or about the time of this final delivery or at any time until late February, 1966 (30, 222-223).

On December 27, 1965, Irwin, while in Fort Lauderdale, Florida, sold 500 shares of National Video through one James Sullivan, a personal friend of Irwin who was associated with the Fort Lauderdale office of Hayden, Stone, a broker and dealer in securities (203, 180). At the time of the sale through Hayden, Stone, Irwin did not know that Dempsey-Tegeler would thereafter demand the delivery of an additional 500 shares of National Video (229-230) The gross proceeds of this sale was approximately $38,000 (180). Irwin would not have sold the 500 shares of National Video through Hayden, Stone if he had known that Dempsey-Tegeler would subsequently request delivery of another 500 shares (229-230).

From and after November 4, 1965, to and including December 31, 1965, Dempsey-Tegeler's records reflected that Irwin was "short" or had failed to deliver 500 shares of National Video (146-148). This reflected short position on its records was due to the fact that due bills had not been demanded or delivered in connection with Irwin's delivery of 500 shares on October 19, 1965 (109-110, 118). The customer's month-end statements for the months of November and December, 1965, which reflected Irwin's position according to Dempsey-Tegeler's records, were not received by Irwin until March, 1966 (205-206).

In early January, 1966, as a result of his examination of Irwin's month-end statement for December, 1965, Bell first became aware of the fact that Dempsey-Tegeler's records reflected that Irwin was "short" 500 shares of National Video, and he then informed Shields of this situation (92-

94). Prior to being informed by Bell of the short position, Shields did not realize that the records reflected Irwin to be in a short position; indeed, Shields was under the impression that Irwin was "even" (70-72). After being so advised by Bell, Shields told Bell to check the records to be absolutely sure of the short position (70). Bell said that he would recheck his records and "get back to" Shields (69). At this time, Shields was of the opinion that the records of Dempsey-Tegeler were "fouled up", and he had so stated to Irwin (74-76). Further, Shields held Bell responsible for the condition of the records, and he had informed Irwin of his conclusion that Bell was responsible for this situation (76, 274).

In his deposition, Shields testified that about one week after he learned from Bell that the records showed Irwin short, he called Irwin and informed him of the situation (69-71). He further testified that all he could remember Irwin saying was that he (Irwin) did not have the stock (77).

Shields told Bell to check with the transfer agent, and approximately one week thereafter Bell informed Shields that the transfer agent had said the 500 shares were mailed to Irwin (78). Shields then called Irwin and told him what the transfer agent had said (78). Shields stated he couldn't recall what Irwin's reply was to his advice as to what had been learned from the transfer agent (78-79).

Irwin testified upon deposition that Shields first informed him of the short position in late February, 1966 (207-208). He further testifield that he told Shields that he had delivered the shares in accordance with Dempsey-Tegeler's request; that he did not know he was in a short position; that he had never been in a short position in his life; and that if they could prove to him that he owed the the shares, he would deliver the shares if he had to pur-

chase them (207-208). Irwin testified that the next communication he had from Dempsey-Tegeler was when Bell wrote him on March 17, 1966, setting forth Bell's understanding of the transaction (208, 19-21).

After Bell's discovery of the short position on Dempsey-Tegeler's records in January, 1966, he called Shields and told him that he wanted receipt of the shares (100). Thereafter, he called Shields once or twice a week during February, 1966, seeking to obtain delivery of the shares (103). In the third week of February, Shields told Bell that Irwin had said that he did not owe Dempsey-Tegeler the shares (104). Simultaneously, Shields told Bell to recheck the account (104). Bell rechecked the account and again explained to Shields that Irwin owed the stock (104-105). Shields again communicated with Irwin, and thereafter Shields again told Bell that Irwin said he did not owe the shares (105).

In the first or second week of March, Bell again asked Shields about the short position (106). Shields said that Irwin's auditors had said he did not owe Dempsey-Tegler the shares (106). At the same time, Shields asked Bell to write a letter to Irwin recapping all of the transactions and to send Irwin copies of the monthly statements for October, November and December, 1965 (106).

On March 17, 1966, Shields had a conversation with Irwin's secretary; he advised her that Dempsey-Tegeler showed receipt of 500 shares on October 28, 1965 and that they did not know where such shares had come from since Dempsey-Tegeler's auditors had taken their October, 1965 records (30). Shields further stated that the "cut off" date for the split was October 28, 1965 and if the shares had been received on that date "it was too late to have the name taken off to avoid the split" (30). This advice was erroneous for the only shares which Shields could have had

reference to were delivered on October 19, 1965 (30-31). In addition, Shields' oral advice was inaccurate because the "cut off" date for the split was not October 28, 1965 but October 14, 1965 (4, 16-17). This erroneous advice was communicated to Irwin (30-31). On the same day, Bell wrote a letter to Irwin "recapping" the National Video transactions and requesting delivery of 500 shares (107, 19-21).

Shields' oral advice to Irwin's secretary and Bell's letter of the same date to Irwin are directly contradictory to each other on the question crucial to whether Irwin was in fact short—the "cut off" date of the split and when Irwin had made his first 500 share delivery. Indeed, if Shields' advice as to the "cut off" date was accurate, Irwin had in fact delivered all of the shares that Dempsey-Tegeler was ever entitled to.

On March 23, 1966, Ernst & Ernst, Irwin's auditors, informed Irwin by letter that after his last sale of National Video shares through Dempsey-Tegeler, he owned 500 shares of that stock (22-23, 215-216). On March 25, 1966, Irwin referred Dempsey-Tegeler's letter of March 17 to Ernst & Ernst (216).

Irwin's refusal or failure to deliver was referred to Bryan, Cave, McPheeters & Roberts, attorneys for Dempsey-Tegeler; and by letter of March 28, 1966, these attorneys demanded that Irwin make an immediate delivery of 500 shares of National Video (24). Irwin did not answer this letter (219). At or about this time, Shields told Irwin that he had appealed to Mr. Tegeler of Dempsey-Tegeler in his behalf because the mistake resulting in the confusion over the shares of National Video had been made by Dempsey-Tegeler and that he "got nowhere" (219-220). Irwin broke off relations with Dempsey-Tegeler and Shields (220).

On or about April 15, 1966, Bell placed a telephone call to Irwin (111-112). Bell told Irwin that he had to deliver the stock or that they would purchase the stock for his account (111-112, 209). Bell told Irwin, "Mr. Irwin, you know damn well you owe the shares because you have the letter" (209). Bell then implied that Irwin was trying to get away with something (210). Irwin said he had not heard from the accountants, and Bell called him a "liar" (209). At this point, Bell arranged to have John D'Asaro of Ernst & Ernst tied into his long distance call to Irwin (210-211). At first, D'Asaro failed to answer Irwin's questions as to whether the records showed stock due Dempsey-Tegeler (113). D'Asaro finally said that the records did so show (113). Irwin told Bell that he would not deliver the stock and that Shields had told him that he (Irwin) did not owe Dempsey-Tegeler the stock (114). Bell then threatened to buy the shares for Irwin's account, and Irwin told him that if he did so he did it at Dempsey-Tegeler's risk (212). At the time of this telephone conversation with Bell, Irwin had not received any oral or written communication from D'Asaro or Ernst & Ernst advising him that the records showed National Video shares due Dempsey-Tegeler (209, 212).

On April 18, 1965 Dempsey-Tegeler, purportedly acting as agent for Irwin, purchased 500 shares of National Video at a cost, including a commission, of $55,417.96 (7-8).

Thereafter, after consultation with another accountant, Irwin purchased 500 shares of National Video at $79.00 per share—approximately the same price he received for the 500 shares sold in December, 1965—and tendered them to Dempsey-Tegeler (180, 220-2). His offer was rejected (221). Irwin suffered a substantial loss on the National Video shares so purchased (221).

JURISDICTION BELOW.

Jurisdiction in the District Court was based upon diversity of citizenship and the requisite amount in controversy (3, 9). 28 U. S. C. 1332.

ARGUMENT.

INTRODUCTION.

This was an action for breach of an implied contract and for conversion; it was not an action to recover the amount by which Irwin was alleged to have been unjustly enriched.[1]

After considerable depositional discovery had occurred and "numerous" documents had been filed (the extracts of the deposition testimony comprise approximately 180 pages of the printed appendix below) the District Judge granted summary judgment, in a factual situation which is "somewhat complex" (231). In determining that summary judgement was appropriate, the District Judge conceded that there was evidence before him that Respondent Dempsey-Tegeler had breached duties owed to Petitioner Irwin (239-240). Nevertheless, summary judgment was entered against Irwin on the grounds that (1) Irwin had ratified the breaches of duty of Dempsey-Tegeler (241-245), and (2) Dempsey-Tegeler had relied upon the statement or promise of Irwin, and consequently Irwin was estopped from denying an obligation to deliver National Video shares to Dempsey-Tegeler when the demand was made upon him in April, 1966 (245-247). The District Judge explicitly held, for purposes of Rule 56, that there was no genuine issue of material fact as to Irwin's full *knowledge*

1. A possible explanation for the Plaintiff's failure to seek recovery on the theory of unjust enrichment is that the amount by which Irwin has allegedly been unjustly enriched is approximately equal to the value of the shares tendered to Dempsey-Tegeler prior to the commencement of this action and that the amount expended by Dempsey-Tegeler to cover the short position is substantially in excess of the amount by which Irwin was alleged to have been unjustly enriched.

of the material facts surrounding the breaches of duty of Dempsey-Tegeler so as to constitute a ratification and that there was no genuine issue of material fact that Dempsey-Tegeler *relied* upon Irwin's statement or promise so as to create an estoppel against Irwin (244-247).

The District Court's sole basis for concluding that there was no genuine issue as to Irwin's *knowledge* of the breaches of duty was Irwin's statement to Shields, when informed by Shields that the records showed a short position, that he (Irwin) had delivered the shares in accordance with Dempsey-Tegeler's request; that he did not know that he was in a short position; that he had never been in a short position in his life; and that if they could prove to him that he owed the shares, he would deliver the shares if he had to purchase them (241-244).

The District Court's sole basis for concluding that there was no genuine issue of material fact as to Dempsey-Tegeler's reliance (so as to constitute an estoppel) was the deposition testimony of Dempsey-Tegeler's Executive Vice-President that Dempsey-Tegeler relied upon Irwin's statement or promise (245).

The Court of Appeals affirmed the summary judgment on the basis of ratification and did not reach the question of estoppel and that which necessarily underlay estoppel—reliance. We suggest that the Court of Appeals did not affirm the District Judge's ruling as to estoppel and reliance because of the record herein and also because such a holding would fly in the face of the decisions of this Court in *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 627-628 (1944) and *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473 (1962). The Executive Vice-President of Dempsey-Tegeler's testimony as to Dempsey-Tegeler's reliance was plainly for the jury under the prescriptions of *Sartor* and *Poller, supra.*

In upholding summary judgment on the theory of ratification, the Court of Appeals said:

> "Defendants contend that summary judgment for the plaintiff was improperly granted because there were various issues of fact to be resolved. There is no disagreement as to the statement by Irwin promising to deliver 500 shares of National Video if the plaintiff proved that he owed it. The district court held that this promise constituted a ratification of any wrongful acts by plaintiff. Since the facts in this case which allegedly constituted the ratification are undisputed and presented no genuine issue of material fact for a jury, the district court appropriately disposed of the issue by summary judgment. *Cf. Zahora* v. *Harnischfeger Corporation*, 404 F. 2d 172 (7th Cir. 1968). The district judge, faced with no question as to which reasonable minds could differ, applied the legal criteria as to what constitutes ratification. The *consent to be bound by the acts of the plaintiff was manifest in the verbal statement of Irwin.* We affirm the district judge's conclusion that the promise to deliver the shares constituted a ratification by Irwin.
>
> * * * * *
>
> "Here, there was *no question as to the meaning* of Irwin's words *consenting* to deliver the 500 shares.
>
> * * * * *
>
> "Here, Irwin was sufficiently *aware* of the transactions involving the purchase and sale of National Video shares to *know* the nature of the conduct he was ratifying. . . ." (Emphasis supplied.) (App. 4a, 5a.)

I.

THE HOLDING OF THE COURT OF APPEALS THAT SUMMARY JUDGMENT WAS APPROPRIATE WHERE THE QUESTION WAS IRWIN'S KNOWLEDGE AND INTENT IS CONTRARY TO THIS COURT'S DECISIONS IN WHITE MOTOR CO *v.* UNITED STATES AND POLLER v. COLUMBIA BROADCASTING SYSTEM, INC. AND THEREBY IRWIN HAS BEEN DENIED HIS RIGHT TO A JURY TRIAL.

Ratification is based upon the *intention* of the alleged ratifier *and his full knowledge of all* the material facts surrounding the conduct which he is ratifying. *Wing* v. *Lederer*, 77 Ill. App. 2d 413, 418, 222 N. E. 535, 538 (1966). The principles of *Wing* were recognized by the Court of Appeals (App. 4a).

Below, summary judgment was granted where the issues concerned "knowledge" and "intent" (App. 4a-5a). Such a holding is absolutely contrary to the oft-cited decisions of this Court concerning summary judgment.

In *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), this Court said:

> "Summary judgments have a place in the antitrust field, as elsewhere, though as we warned in *Poller* v. *Columbia Broadcasting Systems*, 368 U. S. 464, 473, they are not appropriate 'where motive and intent play leading roles.' " p. 259.

Here, "leading roles" were played by "knowledge" and "intent"; yet, despite the prescriptions of this Court summary judgment was entered—indeed, in the face of a jury demand.

Almost equally as important, there is just no evidence in this record as to what Irwin knew concerning the breaches of duty of Dempsey-Tegeler at the time he made the statement or promise to Shields; and this situation,

surprisingly enough, was recognized by the District Judge, for he said in his memorandum opinion: "Of course [Irwin] did not know the true facts of the situation, for if he had, there would have been less occasion to make the promise in the contingent manner in which it was made." (244). In fact, the promise or statement of Irwin is evidence of his lack of knowledge, for at the same time he asked for proof of the short position (207-208).

We respectfully submit that the entry of summary judgment below, where the questions of "intent" and "knowledge" were involved, was in derogation of this Court's decisions and served to deprive the Petitioners of their right to trial by jury.

II.

THE INFERENCE MADE BY THE COURT OF APPEALS THAT IRWIN HAD THE REQUISITE KNOWLEDGE AND INTENTION TO RATIFY THE WRONGFUL ACTS OF DEMPSEY-TEGELER IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN UNITED STATES v. DIEBOLD, INC. AND WITH CONTROLLING DECISIONS ON THIS ISSUE IN THE COURTS OF APPEALS FOR THE SECOND, SIXTH, EIGHTH, NINTH AND TENTH CIRCUITS.

It has long been held in this Court and in at least five of the Circuits (Second, Sixth, Eighth, Ninth and Tenth) that the mere existence of an undisputed subsidiary or underlying fact (here Irwin's promise or statement) does not permit the entry of summary judgment if the inferences to be drawn therefrom and other evidence in the record are disputed. *United States* v. *Diebold*, 369 U. S. 654, 655 (1962); *Empire Electronics Co.* v. *United States*, 311 F. 2d 175, 179-180 (2nd Cir., 1962); *Hart* v. *Johnson*, 389 F. 2d 239, 241-242 (6th Cir., 1968); *S. J. Groves & Sons* v. *Ohio Turnpike Commission*, 315 F. 2d 235, 237-238 (6th Cir., 1963); *Severson* v. *Fleck*, 251 F. 2d 920 (8th

Cir., 1958); *Cameron* v. *Vancouver Plywood Corporation*, 266 F. 2d 535, 539-540 (9th Cir., 1959); and *United States* v. *Kansas Gas and Electric Company*, 287 F. 2d 601 (10th Cir., 1961). This basic rule was succinctly stated in *S. J. Groves & Sons Company* v. *Ohio Turnpike Commission*, *supra*, at 237-238.

> "It is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist should be drawn from such facts. Under such circumstances the case is not one to be decided by the Trial Judge on a motion for summary judgment."

But what is prohibited by *Diebold* and the cases from the other circuits which are cited above was effected below —Irwin's *knowledge* and his *intention* (so as to constitute ratification) were inferred from his statement to Shields that he did not know he was in a short position, that he had made deliveries in accordance with Shields request, that he had never been in a short position on any stock in his life and *that if Dempsey-Tegeler could prove to him that he owed* the shares he would deliver them. We suggest that the inference of *knowledge* and *intent* from this statement is without basis in fact; indeed, the inference of a lack of knowledge is plainly inferable from Irwin's request for *proof*. At best Irwin's statement was ambiguous and equivocal, and this was recognized by the Court of Appeals (App. 3a).

But wholly apart from nature and character of his statement, there was other evidence in the record (also undisputed), from which an inference of the absence of the requisite knowledge and intention on the part of Irwin could be inferred.

We believe that the existence of a genuine issue of fact as to Irwin's requisite intention and knowledge is plainly demonstrated rhetorically. Would a jury be entitled to infer that Irwin lacked the requisite knowledge of the prior wrongful conduct and the intent to ratify such wrongful conduct if the following events and statements were placed in evidence before them?

1. At the time of Irwin's statement to Shields, upon which the Court of Appeals relies, Irwin stated to Shields that he did not know that he was in a short position (207).

2. At that time Irwin asked for the proof of the short position (208).

3. At that time the only source of Shields' information was Mr. Bell of Dempsey-Tegeler who Shields held responsible for certain records of Dempsey-Tegeler being "fouled up" (74-76).

4. At or before that time Shields had told Irwin that Bell was responsible for the aforesaid condition of the records (74-76).

5. Irwin told Shields to get the information for him (208).

6. At or about the time of the statement by Irwin, Shields requested that Bell write Irwin a letter explaining what had happened with respect to the transactions in National Video and that Irwin be sent certain prior monthly statements concerning the account which had not been theretofore received by Irwin (106-107, 204-205).

7. *Subsequent* to the statement of Irwin, Bell sent Irwin a letter which attempted to inform him of what had happened in connection with the transactions in National Video (18-21, 208).

8. That letter was referred by Irwin to his accountants (171).

We respectfully submit that a jury would be entitled, indeed constrained, to infer and conclude that Irwin did not have the requisite knowledge or intention at the time he made that statements to Shields so as to be held to have ratified Dempsey-Tegeler's wrongful conduct.

Furthermore, Irwin specifically testified to his lack of knowledge. Upon deposition, he said:

> "Q. At the time you sold those shares [shares sold on December 27, 1965], did you know, in fact, that Dempsey-Tegeler was going to require you to deliver an additional five hundred shares?
>
> A. No.
>
> Q. Did you have any knowledge that your previous deliveries of National Video had been deficient in any manner?
>
> A. No, sir." (229-230.)

The Opinion of the Court of Appeals in this case unequivocally conflicts with pertinent decisions of this Court and with controlling decisions in the Second, Sixth, Eighth, Ninth and Tenth Circuits. The result of this has been to deny Petitioners their right to trial by jury.

CONCLUSION.

Here, Dempsey-Tegeler who admittedly owed certain duties to Irwin, who undertook to seasonably and accurately inform him of his securities' delivery requirements, and who admittedly breached those duties has been made completely whole by the entry of summary judgment. In view of the prescriptions of this Court concerning the entry of summary judgment, we respectfully submit that substantial error was committed below—as a result of which Irwin has been denied his Constitutional right to trial by jury.

We do not and never have suggested that Irwin does not owe Dempsey-Tegeler something. But Dempsey-Tegeler

has elected not to proceed on a theory of unjust enrichment; it has sought to make itself whole despite its admitted breaches and defalcations against Irwin. It is important to keep in mind that the dispute between Irvin and Dempsey-Tegeler stemmed from the negligence and wrongdoing of Dempsey-Tegeler.

Moreover, Irwin did, after the facts were made known to him, buy 500 shares of National Video and tender it to Dempsey-Tegeler.

The effect of the decision below is to reward a negligent stock broker at the expense of his customer, who sought only to be informed of his position. This result we believe is unrealistic and effectively permits a wrongdoer to profit by his own wrong.

Since the decision below is in direct conflict with decisions of this Court and with decisions in several of the other circuits and has served to deny Irwin his constitutional right to a trial by jury, we respectfully submit that certiorari be granted.

Respectfully submitted,

JOHN H. BISHOP,
141 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Petitioners.

BISHOP, BURDETT, ERICSON & FLYNN,
Of Counsel.

Appendix

APPENDIX.

OPINION AND JUDGMENT BELOW.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

September Term, 1968—April Session, 1969.

Nos. 17007, 17008

DEMPSEY-TEGELER & Co., INC.,
Plaintiff-Appellee (Cross-Appellant),

vs.

RICHARD D. IRWIN and
ANNE MARIE IRWIN,
Defendants-Appellants (Cross-Appellees).

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 5, 1969.

Before HASTINGS, *Senior Circuit Judge,* and KILEY and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* Plaintiff-appellee, Dempsey-Tegeler & Co., Inc., filed suit under 28 U. S. C. § 1332 to recover for failure of defendants-appellants, Richard D. Irwin and Anne Marie Irwin to deliver 500 shares of National Video Corporation stock. The district court having before it the pleadings, documentary evidence and

extensive depositions, granted summary judgment for the plaintiff from which defendants appeal. Plaintiff cross-appeals from the denial of interest.

Since 1963, Richard D. Irwin and his wife, Anne Marie Irwin, for whom Richard Irwin acted as agent in all stock transactions, traded extensively in corporate stocks. Dempsey-Tegeler & Co., Inc., plaintiff, acted as agent and broker for the Irwins. Plaintiff's representative in all transactions between the plaintiff and defendants was Robert Shields. Since Irwin was a very busy individual, he instructed Shields to keep records of all transactions. The following records were kept by Shields: (1) a book reflecting Irwin's current position in a security; (2) copies of all purchase and sale confirmations sent to Irwin; and (3) copies of monthly statements of account sent to Irwin.

Prior to September 13, 1965, Irwin owned 1500 shares of National Video Corporation which traded on the American Stock Exchange. On September 13, 1965, the Board of Directors announced a proposed 2 for 1 stock split to be acted upon at the annual meeting on October 13, 1965. On September 29, 1965, Irwin sold 500 shares of National Video. The American Stock Exchange announced on October 8, 1965, that the stock of National Video would sell "ex" the distribution on November 1, 1965, and that all stock delivered after October 12, 1965, must be accompanied by a due bill to be redeemed on November 5, 1965, by the delivery of the shares distributed as a result of the split.

Shields on October 18, 1965, requested from Irwin's secretary the delivery of 500 shares of National Video sold on September 29. Irwin sold an additional 500 shares of National Video on October 22, 1965, which was prior to the date the shares were traded "ex" distribution on the American Stock Exchange. Sometime after October 28, 1965, he received 1500 split shares from National Video

in the mail. On November 3 and again on November 4, Irwin sold 500 shares, or a total of 1000 shares of National Video for the two days. Not including the sale on September 29, Irwin sold 2000 shares. Shields called Irwin's secretary on November 18, 1965, and asked her to deliver 2000 shares of National Video in order to settle the account. Since the September 29 sale was not settled until after the corporate record date of the split, the split shares should have been delivered to Dempsey-Tegeler when they were received by Irwin in order to settle the transaction. However, no request was made for the 500 split shares of National Video, and Irwin sold these extra 500 shares of National Video through another broker on November 27, 1965, while in Florida.

In late February, 1966, Irwin was first informed by Shields that he was short 500 shares of National Video to Dempsey-Tegeler. Irwin was equivocal and Shields, being unable to explain how the short position arose, said he would have the account rechecked. Irwin stated that if it could be proved that he owed plaintiff the stock, he would deliver 500 shares. Various discussions took place between officials of Dempsey-Tegeler and Irwin and his accountants. At all times Irwin denied that he owed 500 shares and claimed that plaintiff failed to prove otherwise. On April 16, 1966, an official of the plaintiff called Irwin in Ohio and demanded payment. Irwin's accountant was connected to the long distance call and after prodding by Irwin, admitted that Irwin owed the shares, but Irwin denied this short position. Plaintiff demanded payment by April 18. Since defendant did not deliver on April 18, plaintiff purchased 500 shares on the open market at a price of $111 per share. In the early part of May, Irwin consulted another accountant who confirmed that Irwin was short 500 shares. When the price of National Video fell to $79 per share, Irwin purchased 500 shares and

tendered them to plaintiff. Plaintiff refused and this suit to recover the cost of the 500 shares purchased on April 18, 1966, followed.

Defendants contend that summary judgment for the plaintiff was improperly granted because there were various issues of fact to be resolved. There is no disagreement as to the statement by Irwin promising to deliver 500 shares of National Video if the plaintiff proved that he owed it. The district court held that this promise constituted a ratification of any wrongful acts by plaintiff. Since the facts in this case which allegedly constituted the ratification are undisputed and presented no genuine issue of material fact for a jury, the district court appropriately disposed of the issue by summary judgment. Cf. *Zahora* v. *Harnischfeger Corporation,* 404 F. 2d 172 (7th Cir. 1968). The district judge, faced with no question as to which reasonable minds could differ, applied the legal criteria as to what constitutes ratification. The consent to be bound by the acts of the plaintiff was manifest in the verbal statement of Irwin. We affirm the district judge's conclusion that the promise to deliver the shares constituted a ratification by Irwin.

Ratification is a unilateral act and reliance is not a necessary element. Seavy, Law of Agency, § 37 (1964). Reliance is a necessary ingredient where the theory is one of estoppel. If the consent is not manifest but must be inferred from physical acts or from silence, it may be possible to hold that there was sufficient reliance on the conduct such that the party is estopped from denying ratification. *Id.* § 40. Here, there was no question as to the meaning of Irwin's words consenting to deliver the 500 shares.

It is not necessary as defendants claim, that the ratifier have complete and full knowledge of all acts and circum-

stances surrounding the transaction. Rather, if the ratification is made with knowledge of the material facts, it is valid. *Wing* v. *Lederer,* 77 Ill. App. 2d 413, 418 (1966). Here, Irwin was sufficiently aware of the transactions involving the purchase and sale of National Video shares to know the nature of the conduct he was ratifying, and he should be held responsible for his promise. Meyer, The Law of Stock Brokers and Stock Exchanges, 408-12 (1932). Irwin's promise to deliver would be meaningless, if at the time the promise is made he is required to have full knowledge that he was short 500 shares.

Irwin contends that the damages should be based on the market price of the stock at the date the shares should have been delivered. Here, however, Irwin ratified the failure to require delivery and did not repudiate his promise until April 18, 1966.

Defendants also contend that since plaintiff agreed to keep the records of account and because of negligence failed to inform defendants that the shares were owed, plaintiff waives the right to demand the securities. Since defendants ratified the wrongful acts of the plaintiff, they cannot now assert the doctrine of waiver and estoppel.

Plaintiff cross-appeals from the denial of interest from date of the purchase by the plaintiff of 500 shares on April 18, 1966. Since this is an action under diversity jurisdiction, this Court must apply the Illinois law governing interest. *Midstates Oil Corp.* v. *Waller,* 207 F. 2d 127, 131 (5th Cir. 1953).

Ill. Rev. Stat. ch. 74 § 2 provides:

> Rate on money after due
>
> Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or

> advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment. 1879, May 24, Laws 1879, p. 184, § 2; 1891, June 17, Laws 1891, p. 149, § 1.

Plaintiff contends that the confirmation of the April 18, 1966, transaction sent to defendants constitutes an "instrument of writing." However, since there was no underlying agreement as to the purchase, the confirmation does not come within the statutory construction of "other instrument of writing." Ill. Rev. Stat. Ann. ch. 74 § 2, n. 51-100. Since there was no authorization to purchase the stock, the purchase price was not "advance for the use of another." There was no "settlement of account" since defendants did not admit to the owing of any stock on April 18. *Underhill* v. *Goff*, 48 Ill. 198 (1868); *Marione* v. *Ehrat*, 175 Ill. 649 (1912). Too, we do not think under the circumstances presented that the money was "withheld by an unreasonable and vexatious delay." Therefore, plaintiff is not entitled to interest from April 18, 1966, to the date of the judgment.

AFFIRMED.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois.

Tuesday, August 5, 1969.

Before
HON. JOHN S. HASTINGS, *Senior Circuit Judge,*
HON. ROGER J. KILEY, *Circuit Judge,*
HON. OTTO KERNER, *Circuit Judge.*

Nos. 17007, 17008
DEMPSEY-TEGELER & CO., INC.,
Plaintiff-Appellee (Cross-Appellant),
vs.
RICHARD D. IRWIN and ANNE MARIE IRWIN,
Defendants-Appellants (Cross-Appellees).

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with interest, from the date of the judgment of the District Court, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of costs between the parties to this appeal.